NO. 22099

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ANTONIO DA COSTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee
United States of America.

NO. 22099

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ANTONIO DA COSTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

(Cases) — Page

Table of Authorities (continued)

STATUTES

NO. 22099

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ANTONIO DA COSTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in one count of a two-count indictment, at the conclusion of trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a two-count indictment returned by the Federal Grand Jury for the Southern District of California. [C.T. 2-3].[1/]

Count One charged that appellant left the United States within the Southern Division of the Southern District of California without registering with a Customs official, agent, or employee as required by law and without obtaining the certificate required by law to be obtained upon leaving the United States, being a citizen of the United States who was convicted of conspiracy to smuggle, acquire, and receive marihuana in 1953 and sale, etc., of heroin in 1956. [C.T. 2].

Count Two charged that appellant returned to, and entered into, the United States within the Southern Division of the Southern District of California without registering and without surrendering, to a Customs official, agent, or employee, the certificate which should have been obtained prior to departing from the United States, as required by 18 U.S.C.A. 1407 and certain rules and regulations, being a citizen of the United States who had the prior marihuana and heroin convictions mentioned in Count One. [C.T. 2-3].

Jury trial of appellant commenced on July 19, 1966, before United States District Judge Fred Kunzel [R.T. 4].[2/] The Court granted appellant's motion for judgment of acquittal as to Count One [R.T. 192]. Appellant

---

1/ "C.T." refers to the Clerk's Transcript of Record.

2/ "R.T." refers to the Reporter's Transcript on Appeal.

was found guilty as charged in Count Two on July 21, 1966 [C.T. 4].

Thereafter, on September 19, 1966, appellant was given a suspended sentence of three years with probation for five years [C.T. 5]. He filed a timely notice of appeal [C.T. 6-7].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged insufficiency of the evidence to sustain the verdict.
2. Alleged error in instructing the jurors to acquit appellant if they believed part of his testimony.
3. Alleged error in instructing the jurors in regard to the "uses" provision of 18 U. S. C. A. 1407.
4. Alleged unconstitutionality of 18 U. S. C. A. 1407.

(Appellant's Opening Brief, p. 21).

IV

STATEMENT OF THE FACTS

Appellant was seen in Inglewood, California, by United States Customs Agent Thaine Ellis on July 24, 1964 [R.T. 10-11]. He was seen at the police headquarters in San Luis, Mexico on the afternoon of June 12, 1965 [R.T. 13-15]. He was seen by United States Customs Agent Donald Quick near the Roadside Inn at Jacumba, California, on the same night between midnight and 12:30 [R.T. 23, 58-61].

Evidence was received relating to appellant's citizenship (place of birth) and prior convictions of conspiracy to smuggle, etc., marihuana

in 1953 and sale, etc., of heroin in 1956 [R.T. 8-9, 278-80].

A search of Customs records showed no indication that appellant registered under 18 U. S. C. A. 1407 at any Mexican-American border-crossing station in California or Arizona during June of 1965 [R.T. 26, 33-36, 40-43]. Appellant testified that he did not register upon the occasion in question and that he entered the United States at San Luis, Arizona [R.T. 194-95, 212]. He testified that he knew that he was required to register and that he also failed to register upon leaving the United States [R.T. 212]. He had previously registered with Customs twice in July, 1964; once in October, 1964; twice in November, 1964; once in December. 1964; and once in March, 1965 [R.T. 185-86, 189-90].

On June 10, 1965, United States Customs Agent George F.Holleron had placed a "lookout" for appellant at the port of entry at San Luis, Arizona [R.T. 150-51]. A "lookout" consisted of a description of a person or automobile. This particular lookout contained a photograph of appellant, placed upon a board at the pedestrian traffic lane in the vicinity of the inspector on duty. Agent Holleron instructed the inspectors on duty to detain and search appellant [R.T. 152-53, 158]. Agent Holleron received no later reports to the effect that appellant had been stopped and searched at the San Luis port [R.T. 160-61]. Upon some occasions in the past, persons upon "lookout" had been overlooked by inspectors at San Luis [R.T. 162].

Customs Inspector John O. Ford was on duty at San Luis from 4 p.m. until midnight on June 12, 1965, and was aware of the "lookout" for appellant. Only one other inspector was on duty during that shift, and

Inspector Ford discussed the "lookout" with him. Agent Holleron gave Inspector Ford some vehicle license numbers in connection with that "lookout" on June 12. Inspector Ford did not observe an entry by appellant at the San Luis port of entry and received no information that he had entered [R.T. 163-65, 167].

San Luis is 24 miles south of Yuma and about 60 miles east of Calexico. San Luis, Mexico, is on the Mexico-Arizona border about 12 miles from the State of California [R.T. 15, 20]. Jacumba, California, is on the Mexican-American border, about 50 miles from Calexico. Highway 80 passes through Jacumba at a point about three-eighths of a mile north of the border. The Roadside Inn also was about three-eighths of a mile from the border [R.T. 60, 63, 65]. There was a barbed wire fence at the border at Jacumba [R.T. 67].

The shortest route by standard roadways between San Luis and Jacumba was through Mexico and Calexico. This also was the fastest San Luis-Jacumba route in the daytime, although the Yuma route was better at night, because the American highway was better. The Mexican route to Calexico was partially under construction at that time [R.T. 78-80, 90-91, 95, 133].

The distance from San Luis, Arizona, to Jacumba was approximately 137 miles by the American route (through Yuma) and approximately 106 miles by the Mexicali route (through Calexico) [R.T. 138-39]. The normal traffic delay at Calexico would not be more than 5 or 10 minutes at the most [R.T. 142]. Appellant testified that Elaine Bryant, one of his companions

in San Luis, Mexico, on June 12, was driving a blue 1965 Mustang automobile. He testified that he made arrangements at San Luis, Mexico, to meet Miss Bryant at the Roadside Inn in Jacumba [R.T. 195-96, 198]. At approximately 11 p.m. on June 12, 1965, a blue 1965 Mustang automobile arrived at the port of entry at Calexico with only one occupant, a female. The Mustang vehicle was on "lookout" at Calexico, was searched, and then proceeded into the United States [R.T. 58-60, 146]. Customs Agent Paul Martin followed the vehicle from Calexico to Jacumba, Elaine Bryant was the driver of the Mustang. Customs Agent Quick saw appellant talking with "Alene Marie Bryant" at the Roadside Inn [R.T. 61, 172-73, 181].

Appellant testified that he left the police office at San Luis, Mexico, at approximately 7:30 on June 12; rode to the border in a white Rambler; and walked across the border at San Luis, Arizona, answering the questions asked by the Customs Inspector [R.T. 194-99]. He testified that he was wearing a sombrero-type hat, that he kept his head down, and that he looked at the inspector over the top rims of his glasses and under the brim of his hat [R.T. 194-95, 199]. He testified that he then entered the Rambler, which had been driven across by a friend. He declined to name the friend. However, when the Court ordered an answer, he admitted that the friend was Richard Cook [R.T. 199-199-A].

Appellant testified that he rode in the car to Jacumba, arriving between 11 and 12, closer to 12; that Erline was not there; that Cook left in the Rambler; that he saw Cook again that night in Pasadena; and that he, appellant, was with Erline Bryant and one other man at the Roadside Inn.

[R.T. 200-202].

Appellant also testified that one Rodriguez, a friend of his, was at the Roadside Inn but was not with appellant; that he did not speak to Rodriguez; that he went from Jacumba to San Diego and went by Rodriguez's house because "I figured that's where he would go"; and that Rodriguez was with him when the vehicle was subsequently stopped and partially searched at the San Clemente immigration checkpoint on the route from San Diego to Pasadena [R.T. 204, 208-10].

Customs Port Investigator Owen Miller, Jr., testified that he saw Miss Bryant and three other persons, including appellant, at a cafe in Jacumba, and that they appeared to be talking [R.T. 68, 70, 74, 76]. Appellant testified that he was with Erline and only one other man at the Roadside Inn [R.T. 202]. Appellant admitted two felony convictions [R.T. 214].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant asserts that the evidence was insufficient to sustain the conviction He does not contend that the Government failed to prove any of the elements of the crime. On the contrary, he admits that he entered the United States without registering. [R.T. 212].

To summarize appellant's position, he does not deny that he

committed the crime but claims that he was tried and placed upon probation in the wrong District. This is simply a venue objection which appellant describes as a question of "jurisdiction and venue . . . ." (Appellant's Opening Brief, p. 22). However, this is not a jurisdictional question, since there is no doubt that the Court had jurisdiction of the defendant and jurisdiction to hear prosecutions under 18 U. S. C. A. 1407.

The terms "jurisdiction" and "venue" should not be confused.

Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc. 343 F.2d 7, 11 (8th Cir. 1965);

Toulmin v. James Mfg. Co., 27 Fed. Supp. 512, 515 (W.D.N.Y. 1939).

Venue may be waived. The term, "venue," "'does not refer to jurisdiction at all.'"

Arganbright v. Good, 46 Cal. App. 2nd Supp. 877, 878-79, citing Paige v. Sinclair, 130 N. E. 177, 178.

A venue question is not a question of jurisdiction.

Lii v. United States, 198 F. 2d 109, 113 (9th Cir. 1952).

Treating the question as one of venue, it is apparent that appellant waived his venue objection by going to trial upon the merits.

Rodd v. United States, 165 F.2d 54, 56 (9th Cir. 1947), cert. denied, 334 U. S. 815 (1948).

Venue objections may not be considered upon appeal where, as here, there was no motion for change of venue in the trial court.

Carbo v. United States, 314 F.2d 718, 733, n.15 (9th Cir. 1963).

Appellant made no such motion, possibly preferring a trial in a District closer to his own residence.

However, assuming arguendo that appellant has not waived his venue objection, it is respectfully submitted that a consideration of the evidence most favorable to the prevailing party in the trial court, which is the proper test upon appeal, [3] leads to the conclusion that venue was proved beyond a reasonable doubt, even though the Government was not required to prove venue beyond a reasonable doubt.

The reasonable doubt rule does not apply to proof of venue.

Hill v. United States, 284 F.2d 754, 755 (9th Cir. 1960), cert. denied, 365 U.S. 873 (1961).

United States v. Charlton, 372 F.2d 663, 665 (6th Cir. 1967), cert. denied, 387 U. S. 936 (1967).

Dean v. United States, 246 F.2d 335, 338 (8th Cir. 1957);

Blair v. United States, 32 F.2d 130, 132 (8th Cir. 1929).

> "If there were any error it favored defendants because the court's instruction may have required the jury to find venue beyond a reasonable doubt, and by the great weight of authority, venue is a fact which need be proved only by a preponderance of the evidence."

Charlton, supra, at p. 665.

3/ Davenport v. United States, 260 F.2d 591, 598 (9th Cir. 1958), cert. denied, 359 U.S. 909 (1959).

It is apparent that venue may be established by circumstantial evidence, as it has been held that "If, upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient."

United States v. Chiarelli, 192 F.2d 528, 532 (7th Cir. 1951), cert. denied, 342 U. S. 913 (1952) (Emphasis added).

It was clear from the evidence that appellant entered the United States without registering. The venue question, if such a question remains to be decided, involves the determination of whether the entry was at San Luis, Arizona, as claimed by appellant, or along the Mexico-California border, as determined by the unanimous jury verdict.

Appellant was in San Luis, Mexico, on the afternoon of June 12, 1965. On the same night, between midnight and 12:30, appellant was observed at Jacumba, California, at a point approximately three-eighths of a mile north of the border between Mexico and California (i.e., the Southern District of California) [R.T. 13-15, 58-61, 63, 65].

The shortest route by standard roadways between San Luis and Jacumba was through Mexico (i.e., to the Mexico-California border) [R.T. 79-80]. Appellant claimed to have crossed the border at San Luis, Arizona, but there was a "lookout" for him with his photograph at the San Luis port of entry, both inspectors at that port were aware of the "lookout," and one of them, Inspector Ford, did not observe any entry by appellant and received no information that he had entered, although the "lookout" called for search of appellant [R.T. 150-52, 158, 163-65, 167, 194-95].

Appellant contended that Elaine Bryant, one of his companions in Mexico, had agreed to meet him in Jacumba [R.T. 195-96, 198]. Miss Bryant entered the United States at Calexico, California. She arrived at Jacumba between 12 and 12:30 [R.T. 23, 58, 61]. Appellant testified that he arrived at Jacumba between 11 and 12, closer to 12 [R.T. 200]. It is unlikely that they would have reached this alleged rendevous point so close in time with one party going through Mexico to California and the other party going through Arizona to California. It is even more unlikely that the leaders of this team would send one vehicle on the Mexican side and another on the American side, to arrive at the same destination. They may have preferred the Calexico route because it was shorter or the American route because the roads were better, but they would not prefer both routes.

In view of appellant's two prior felony convictions, his impeachment upon the question of the number of companions present at Jacumba, his evasiveness when questioned concerning the activities of Richard Cook, and his unbelievable account of the role of Rodriguez, it is respectfully submitted that the jurors were fully justified in rejecting appellant's claim that he talked to the inspector at San Luis and proceeded through the port of entry after peering at the inspector over the top of his glasses, under the brim of a sombrero-type hat [R.T. 70, 74, 76, 194-95, 199, 199-A, 202, 204, 207-10, 214].

> "It was for the jury to determine where the truth lay. They were not required to believe the appellant."
>
> Davenport v. United States, 260 F.2d 591, 598 (9th Cir. 1958)

Appellant quotes a statement by the prosecutor to the effect that the case was "thin" and a suggestion by the trial Judge to the effect that the case was not strong. [R.T. 96]. However, they were not discussing the total case now before this Court. Following these remarks, nearly 95 additional pages of testimony appear in the record before the point at which the Government rested its case [R.T. 96-191]. This includes the damaging testimony regarding the "lookout" at San Luis [R.T. 151-161].

Appellant finds fault with the trial Judge's suggestion that appellant might have avoided the San Luis port of entry in order to avoid Federal agents who might be looking for him. Appellant states that he had no reason to suspect re-arrest after release by Federal agents in Mexico (Appellant's Opening Brief, pp. 24-25). However, there was no evidence that appellant was released by American Federal agents in Mexico. He was released by municipal police [R.T. 196]. Although a Yuma County Deputy Sheriff spent some time with appellant on that occasion, the deputy pretended to be an officer from Sonora [R.T. 12-13, 15, 19], so appellant had no reason to believe that he was released by American authorities.

Appellant states that there was a "lookout" for him at Calexico (Appellant's Opening Brief, p. 25). Appellee has been unable to find such evidence in the record. Appellant's counsel told the jury that there was a lookout at San Luis and that "There was no showing that they placed a lookout any place else." [R.T. 249].

Of course, the existence of a "lookout" at Calexico would not in any way obstruct appellant from slipping under, through, or over the barbed

wire at the border at Jacumba.

B. THE INSTRUCTION TO ACQUIT APPELLANT IF THE JURORS BELIEVED PART OF HIS TESTIMONY DID NOT CONSTITUTE ERROR.

The trial Judge instructed the jurors as follows:

"If you believe the defendant, believe that he crossed at San Luis that evening of June 12th, as he stated, you must then acquit him." [R.T. 283]. This was an instruction in appellant's favor. It amounted to an additional warning to the jurors that lack of venue was a defense even though appellant had, as a practical matter, confessed to commission of the alleged crime in another District. Nevertheless, appellant now objects to this instruction, although there was no objection in the trial Court. [R.T. 218, 288-89].

Appellant also objects to other instructions concerning inferences which could be drawn from the evidence.[4/] The trial Judge summed up the matter by telling the jurors:

"As I say, there is the direct evidence which you can judge

4/ These instructions related to the question of venue, which was waived by failure to move for change of venue. If appellant contends that the question is one of jurisdiction, rather than venue, the instructions were not prejudicial, as jurisdictional questions are decided by the Court, not the jury. 23A C.J.S., p. 274.

and weigh, that the entry was in Arizona; and there is circumstantial evidence from which certain inference can be drawn if you believe the inference should be drawn." [R.T. 285].

This does not indicate that the trial Judge favored one side in the case. Furthermore, he instructed the jurors that "you are the sole judges of the facts," [R.T. 272]; "As I told you a moment ago, you, in addition to being the sole judges of the facts, are also the sole judges of the credibility of the witnesses and the weight their testimony deserves" [R.T. 276]; "you are the sole judges of the facts . . . you may disregard any comment that I might make concerning the evidence in this case" [R.T. 282]; "you may disregard any comments I make upon the evidence" [R.T. 285]; and "Remeber at all times that you are the jurors and you are at liberty to disregard any comments that I have made in arriving at your findings as to the facts." [R.T. 285].

It is presumed that jurors follow the instructions of the court. Cook v. United States, 354 F.2d 529, 532 (9th Cir. 1965).

Aside from the innocuous matter of the Court's comment upon possibilities of a "lookout" at Calexico, appellant failed to object to any of the instructions which he now finds unacceptable [R.T. 217-222, 288-89]. Consequently, appellant's objections to the instructions are barred by Rule 30 of the Federal Rules of Criminal Procedure, which provides in part as follows:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the

jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In view of the mildness of the instructions in question, this case does not appear to be a proper one for disregarding Rule 30 with "this shotgun, 'plain error.'" [5/]

C. THE READING OF PORTIONS OF 18 U.S.C.A. 1407 DID NOT CONSTITUTE ERROR.

Appellant was charged under Title 18, United States Code, Section 1407. During the instructions to the jury, the trial Judge read part of this statute, including portions stating that the law applies to narcotics addicts, users, and certain prior convicted violators [R.T. 280-81].

Appellant, having made no objection to the reading of portions of the statute during the trial, [6/] now finds fault with the instruction upon the ground that it is impossible to determine whether the jurors found him to be an addict, user, or prior convicted violator. There is no problem here. There was no evidence of addiction or use, there was evidence of prior convictions, and the only real issue in the entire trial was the question of venue.

5/ Judge Chambers concurring and dissenting opinion in Herzog v. United States, 235 F.2d 664, 673 (9th Cir. 1956).

6/ Appellant's counsel was informed in advance that the statute would be read to the jury [R.T. 218].

D. 18 U. S. C. A. 1407 VIOLATES NEITHER THE FIFTH NOR EIGHTH AMENDMENT.

During the trial appellant contended that 18 U.S.C.A. 1407 was unconstitutional, without specifying the portions of the Constitution which allegedly were violated, except for a reference to the self-incrimination privilege [R.T. 57-58, 220]. He now states that the statute violates the right to travel and constitutes cruel and unusual punishment.

The statute imposes a slight requirement upon the international traveler, somewhat less than the well-known smallpox vaccination requirement which has been imposed upon millions of citizens who have no prior narcotics records.

The mere requirement of filling out and handing over a registration certificate does not constitute a violation of the right to travel.

Reyes v. United States, 258 F.2d 774, 782-83 (footnote).

"'The right to travel is not an absolute one, free of all restraint or regulation.'"

Reyes, supra, at p. 783 (footnote).

Since registration is not a "punishment," the statute does not involve cruel and unusual punishment.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

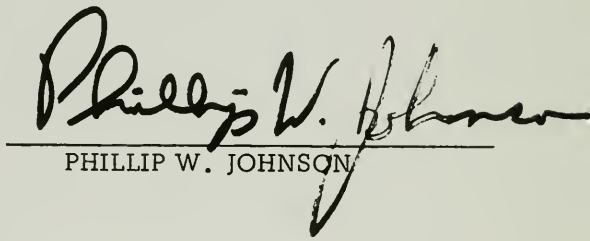
EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON